IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NOS. 3 AND 4 OF 2003.

CRIMINAL REVISION APPLICATION NO. 3 OF 2003.

Mahesh Gaonkar,
Police Inspector,
Panaji Town Police,
Panaji. ... Applicant.

Versus

1. Gajanan H. Kenaudekar,
   r/at Kenkre Estate,
   Santa Cruz, Goa.
2. State through Public
   Prosecutor, Panaji. ... Respondents.

CRIMINAL REVISION APPLICATION NO. 4 OF 2003.

Mahesh Gaonkar,
Police Inspector,
Panaji Town Police,
Panaji. ... Applicant.

Versus

1. D.H. Kenaudekar,
   r/at Flat No. C-11,
   Kenkre Estate,
   Santa Cruz, Tiswadi.
2. State through Public
   Prosecutor, Panaji. ... Respondents.

Mr. A.P. Lawande, Advocate for the Applicant in both applications.

Mr. M. Amonkar, Advocate for the Respondent No. 1 in both applications.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No. 2 State in both applications.

Coram : P.V. HARDAS, J.

Date : 24th July 2003.

ORAL JUDGMENT.

These Criminal Revision Applications have been

filed by the applicant/original accused against the Order of the learned Special Judge, Panaji, in Special Case Nos. 5 and 4 of 2000 respectively.

2. Criminal Revision Application No. 3 of 2003 arises against the Order of the learned Special Judge, in Special Case No. 5 of 2000 and Criminal Revision Application No. 4 of 2003 arises against the Order of the learned Special Judge, in Special Case No. 4 of 2000. Since the accused is the same in both the cases and the points urged before me are the same, both these applications are decided by this common Judgment.

3. For the sake of convenience, a reference to the facts is made as they appear in Criminal Revision Application No. 3 of 2003.

4. An application, under Exhibit 17, came to be filed by the present applicant/original accused praying therein that he may be discharged from Special Case No. 5 of 2002 for an offence punishable under Sections 3(1)(x) and 3(2)(vii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The learned Special Judge, after hearing the learned counsel for the accused and the non-applicant no. 1/complainant, by the impugned Order, rejected the application for discharge filed by the applicant. At

this juncture it is not necessary to make a detailed reference to the reasons advanced by the learned Special Judge for refusing to discharge the applicant/accused, in view of the two points urged by the learned counsel before me in these revisions.

5. Mr. Lawande, the learned counsel for the applicant/accused, has urged before me that a serious irregularity, touching the root of the procedure to be followed before the Court of Sessions, has been committed in the present case. According to the learned counsel for the applicant, the non-applicant no. 1 had filed a complaint case before the learned Judicial Magistrate, First Class, Panaji and the learned Judicial Magistrate, First Class, Panaji, by his Order, dated 20th December 2000, committed the case to the Court of Sessions as the offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are exclusively triable by the Court of Sessions, that is, a Special Court designated under the said Act. According to the learned counsel for the applicant, once the case was committed to the Court of Sessions, the non-applicant no. 1/original complainant had no right of audience before the Court and the proceedings ought to have been conducted only by the Public Prosecutor as per the provisions of Section 225 of the Code of Criminal Procedure. It is, therefore, urged before me

that at the time of consideration of the application filed by the present applicant praying for discharge, the complainant had no right of audience before the Court and the learned trial Court had heard only the counsel for the complainant without hearing the learned Public Prosecutor and, therefore, the Order stands vitiated.

6. A reference may gainfully be made to the Judgment of the Supreme Court in **Rosy and another v. State of Kerala and others,** 2000 AIR SCW 156. In paragraph 18 of the said report the Apex Court has observed thus:-

> " It is pertinent to consider yet another aspect. It is of importance from practical point of view also. Section 209 of the Code enjoins on the magistrate to commit the case to the Court of Session after complying with the provisions in Section 208 of the Code. Once the case is committed it proceeds to the next stage for which the venue is the Court of Session. The trial in the Court of Session is envisaged in Chapter XVIII. It must be borne in mind that in the Session Court a Public Prosecutor alone can conduct prosecution, whether the case was instituted on police report or on complaint. Section 226, falling within the aforesaid Chapter, requires the Public Prosecutor to make the open address to the Session Court. That section reads thus:
>
> "226. Opening case for prosecution:-
>
> When the accused appears or is brought before the Court in pursuance of a commitment of the case under

> Section 209 the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused."

7. The learned Single Judge of the Andhra Pradesh High Court in **B. Janakiramaiah Chetty v. A.K. Parthasarathi and others,** 2002 CRI.L.J. 4062 has observed thus:-

> " No private advocate can take over or act exclusively for the purpose of conducting a prosecution on behalf of the State or can step into the shoes of the Public Prosecutor by excluding the participation of the Public Prosecutor provision under Section 225 Cri.P.C. specifically contemplates that the prosecution shall be conducted by a Public Prosecutor in every trial before a Court of Session. Even the use of the expression "shall" also makes it mandatory and absolute one without there being any exception. Further, the same is reiterated under Section 301(1) CR.P.C., which allows the appearance of the Public Prosecutor to plead without any written authority before any Court. However, under Sub-Section (2) thereof, it only contemplates that any private person can instruct a pleader who can act on the direction of the Public Prosecutor and also submit written arguments with the permission of the Court. Therefore, it is amply clear that the role of a Public Prosecutor in such a case where a private pleader steps in is not totally obliterated. Having regard to the fact that the Public Prosecutor represents the State, which is the prosecuting authority for all the criminal trials, it is the exclusive prerogative of the State to conduct such prosecution through its agent viz., the Public Prosecutor and, therefore, no other person much less any other advocate has any locus or any right to plead on behalf of the prosecution and conduct the case."

8. It is, therefore, clear that a private counsel engaged by the complainant had no right of audience before the Court except for the limited extent as is carved out by Section 301 of the Code of Criminal Procedure. The question whether the absence of the learned Public Prosecutor to assist the Court is an irregularity which has vitiated the proceedings is a matter which need not be gone into at this stage, as the learned counsel for the applicant has made a request that since the learned Public Prosecutor had not been heard in the matter and since the private counsel of the complainant had no right of audience before the Court, he may be permitted to withdraw the applications before this Court, with liberty to file a fresh application before the learned trial Court, if the accused so desires. Normally this Court would not have acceded to such a request but there is a reason for giving such a relief to the applicant.

9. The learned counsel for the applicant has urged before me that since the offences in Special Case Nos 4 and 5 of 2000 have been committed during the same course of transaction, instead of two independent cases, a single charge for the said offences ought to have been framed. Admittedly, according to the prosecution, the complainants in both the cases had gone to the Police Station on 1st September 2000 and the applicant/original

accused is alleged to have abused them on the basis of their caste. The question whether two independent prosecutions are maintainable or whether both the offences can be tried together as one case is a matter which can be decided by the learned trial Court.

10. In these peculiar facts and circumstances of the case, the request of the learned counsel seeking leave to withdraw the applications for discharge is allowed.

11. In view of the fact that the applicant in both revisions is permitted to withdraw the applications for discharge, the Orders impugned in both the Criminal Revision Applications are, hereby, quashed and set aside and liberty is granted to the applicant/accused, if he so desires, to file an application afresh. On such application being filed, the learned trial Court shall hear and decide the said application on its own merits.

12. In view of this, the Criminal Revision Applications are allowed to the extent indicated above.

(P.V. HARDAS)
JUDGE.

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